opinion that it was not a matter which would present any great difficulty. At the commencement of the hearing on seeing the wealth of authority which counsel, through their industry, had assembled, I began to have doubts as to whether, perhaps, I had not been somewhat premature in coming to that opinion but having now had the benefit of the exhaustive arguments of all counsel, I remain of the opinion I originally formed that the matter was after all not so complex or difficult as it might appear.

It is unnecessary nor do I propose to refer to the various interlocutory applications and orders that have been made in this originating summons and of which this present application is the sequel.

The short point for decision is whether this agreement constitutes a licence or a tenancy. The agreement, on the face of it, purports to be a licence. Its sole object is to licence and authorise one Goh Eng Wah to run the business of an amusement park on the land in question. It is expressly declared in the licence that the licence is a licence to carry on the business of an amusement park, such licence being a personal right granted to the licensee. It is further declared, expressly and specifically, that the intention of the parties is not to create a tenancy or a lease.

Having considered the document as a whole and examined its various clauses, it seems to me clear that on the face of the agreement as it stands, the parties intended it to be a licence and not a tenancy. Here, therefore, we have the intention of the grantor, accepted by the grantee, to create a licence and not a tenancy and as was pointed out in *Megarry's* volume on the Rent Acts, 9th Edition at page 52 it would be wrong for the court to extract from the grantor an estate or interest in land in the teeth of the intention of the parties at all events if the words or document by which the transaction was effected are apt for a licence and not for a tenancy. The court, however, must look not so much at the words as the substance of the agreement. The relationship of the parties is determined by the law and not by the label which they choose to put on it. Do therefore the surrounding circumstances in any way affect or alter the express intention of the parties as disclosed in this agreement? I think not. The fact that the licensee is permitted to charge and collect admission fees to the amusement park or to collect licence fees or advertisement charges in respect of the buildings and erections in the park does not, in my view, confer on the licensee an interest in the land so as to constitute a tenancy. Such matters are, in my judgment, inseparable from and essentially a necessary adjunct to the efficient and successful running of the business of an amusement park. It is not, in my judgment, a grant to the licensee of benefits and profits arising out of the land itself.

The licence sought to be granted here is not, in my opinion, an estate or interest in land and at the close of the argument I was informed by counsel for Goh Eng Wah that he was prepared to amend the licence by adding at the end of clause 6 thereof the words "or any interest in land", and I direct that this amendment be made. The agreement itself, the surrounding circumstances, and the conduct of the parties all go to show, I think, that what was intended was that Goh Eng Wah was to have a personal licence or privilege to run the business of an amusement park with no interest in the land. He was merely to use the property in a certain way and on certain terms while the control to some extent remained with the trustees and they retain certain rights as to possession.

Furthermore, it is not open to the trustees to grant a lease, and this court has so held, and even a grant of exclusive possession may be only a licence and not a lease where the grantor, the trustees here, has no power to grant a lease. See *Torbett* v. *Faulkner* [1] and *Finbow* v. *Air Ministry*.[2]

Having said what I have, there is really nothing more to say. I hold that the agreement dated 12th of August, 1965 constitutes a licence personal to the said Goh Eng Wah and does not create a tenancy. The agreement submitted, as amended, is formally approved.

There will be an order in terms of prayers (1), (2) and (3) of the summons. Costs of and incidental to this application of all parties, save and except Goh Eng Wah, will be paid out of income. There will be liberty to all parties to apply.

Order granted.

Solicitors: *Mallal & Namazie, Philip Hoalim & Co.; C.J. Koh & Co.; K.C. Chan; Guok & Co.*

RE SYED EIDRUS ALSAGOFF; SYED MOHAMED ALSAGOFF v. POH KIM SAN & ORS.

[O.C.J. (Winslow J.) October 13, 1965]

[Singapore — Suit No. 675 of 1962]

Power of attorney — Forgery by agent — Execution of mortgage deed by person acting under forged power of attorney — Agent having no express or ostensible authority — Whether principal bound by act of agent.

Deed — Entrustment of title deeds by principal with agent — Agent mortgaging property using forged power of attorney — Whether principal bound — Negligence — Delay.

The plaintiff the executor of the estate of Syed Eidrus claimed a declaration that a number of mortgages and conveyances of properties of Syed Eidrus were null and void and for an order directing the Registrar

of Deeds to cancel the registration of the said deeds. It was alleged that the mortgages and conveyances were executed under a forged power of attorney by or through the person with whom the title deeds of the properties had been kept. Apart from defences based on the facts, the defendants alleged: (a) the acts of the agent in mortgaging and selling the properties were within the scope of his authority, real and apparent as agent; (b) the owner was negligent in entrusting the title deeds of the properties to the agent; (c) there was undue delay in disclaiming the forgery.

Held: (1) mere possession of the title deeds gave the person who had possession no actual or ostensible authority to mortgage the property;

(2) the owner of the property in this case was not negligent in entrusting the title deeds to the firm and even if he was, such negligence was not the proximate or real cause of the fraud;

(3) the delay in disclosing the forgery of the power of attorney to the defendants had not materially prejudiced the defendants and the plaintiff was therefore not estopped from alleging that the forgeries were nullities.

Cases referred to:—

(1) *Sheriffa Shaikah* v. *Ban Hoe Seng & Co. Ltd.* [1963] M.L.J. 243.

(2) *Attorney-General of Ceylon* v. *A. D. Silva* [1953] A.C. 479.

(3) *Bank of Ireland* v. *Evan's Trustees* (1885), 5 H.L.C. 389; 10 E.R. 950.

(4) *In re Cooper* (1882), 20 Ch.D. 634.

(5) *Mayor, Constables and Company of Merchants of the Staple of England* v. *Governor and Company of the Bank of England* (1888), 21 Q.B.D. 160.

(6) *Choo Loong* v. *Lip Kwai Kow* (1930), 7 F.M.S.L.R. 213.

(7) *Brocklesby* v. *Temperance Building Society* [1895] A.C. 180.

(8) *Fung Ka Sun* v. *Chan Fui Hing* [1951] A.C. 489.

CIVIL SUIT.

N. A. Mallal for the plaintiff.

K. A. O'Connor for the defendants.

Cur. Adv. Vult.

Winslow J.: The plaintiff, who is the executor of the Estate of one Syed Eidrus bin Hassan bin Saleh Alsagoff (deceased) (also known by five different variants of the same name, and who will hereinafter be referred to as "Syed Eidrus"), claims a declaration that a number of mortgages and conveyances of the properties of Syed Eidrus set out in paragraph 23 of his claim are null and void, and for an order directing the Registrar of Deeds, Singapore, to cancel the registration of the said deeds and all relative entries in his books and for other consequential orders.

Of the 16 sets of defendants concerned, the claim is being proceeded against only the first defendants, defendant No. 2(b) and defendant No. 12(a), all the other defendants having either submitted to judgment against them or reconveyed the properties concerned (hereinafter referred to as "the properties") or withdrawn their defences and counterclaims.

The present proceedings are founded on the alleged execution by Syed Eidrus of a power of attorney dated 31st July, 1957 (Exhibit P2, which will hereinafter be referred to as "the power") in favour of one Syed Abdulrahman bin Abdullah Alsagoff (P.W.6) who, subsequently, on 30th September, 1957, mortgaged the properties of Syed Eidrus, which are the subject matter of this suit, to the abovenamed first defendants as security for repayment of a loan of $100,000.

It is claimed that Syed Eidrus never executed the aforesaid power by affixing his signature thereto, because, on the date in question, he was never in Singapore but in Indonesia of which he was a national and permanent resident, that he had last visited Singapore in as far back as 1927 and never after that, and that Syed Eidrus never authorised P.W.6 to sell, mortgage or otherwise deal with his properties. In short, the plaintiff claims that both the power and the mortgage deed are forgeries. It is clear from the provisions of section 464 of the Penal Code (Cap. 119) that, if the power is a forgery, then any mortgage deed executed on the strength of that power is also a forgery. It is also clear that, if forged, these documents are nullities unless the plaintiff is estopped from setting up the forgery of the power (see *Halsbury*, 3rd Edition, Volume 11, paragraph 587).

The defendants say that the plaintiff is not entitled to the relief claimed on the ground that P.W.6 had or appeared to have, at all material times, the authority of Syed Eidrus to mortgage the said properties, that in any case the mortgages were executed by an agent of the true owner of the properties acting within the real or alternatively the apparent authority of the true owner of the properties and accordingly the said mortgages were, at the material times, valid and effective mortgages.

The defendants also claim that they were *bona fide* mortgagees for value of the said properties without notice of any incapacity on the part of the mortgagor. The plaintiff admits this proposition.

The defendants further claim that the plaintiff is estopped or alternatively prevented by his laches from denying that the said mortgages were, at all material times, valid and effective mortgages.

Particulars of estoppel and laches have been filed as follows:—

(a) The said Syed Eidrus or his agents failed to disclose or delayed in disclosing the forgery to the first defendants, defendant 2(b) and defendant 12(a) as soon as he or they knew or ought to have known of it and such failure or delay in disclosing as aforesaid has materially prejudiced the position of the said defendants.

(b) The said Syed Eidrus was negligent in entrusting his title deeds to or leaving his title deeds with agents in such circumstances that the said agents would thereby be enabled to carry out the forgery and such negligence has materially prejudiced the position of the said defendants.

Further and better particulars were later filed as follows:—

(a) The failure or delay of the said Syed Eidrus or his personal representatives has materially prejudiced the position of the first defendants, defendant 2(b) and defendant 12(a) in that the said defendants were by reason thereof unable to obtain restitution from the said Syed Abdulrahman bin Abdullah Alsagoff.

(b) The negligence of the said Syed Eidrus has materially prejudiced the position of the first defendants, defendant 2(b) and defendant 12(a) in that but for such negligence (1) the said defendants would not have been put to loss and expense in contesting these proceedings (2) the consideration given by the said defendants for the purchase or mortgage of the said properties would not have failed (as to which the said defendants make no admission).

The issues I have to decide in this case, as submitted by counsel for the plaintiff with which counsel for the defendants did not disagree, are, therefore, as follows:—

1. Whether Syed Eidrus died on 15/7/1961 leaving a will dated the 10th February 1942 and the plaintiff is the present executor of his will.

2. Whether Syed Eidrus owned the properties referred to in paragraph 2 of the statement of claim.

3. Whether Syed Abdulrahman bin Abdullah Alsagoff was the agent of Syed Eidrus for the purpose of collecting the rents of his properties and managing same.

4. Whether the power of attorney dated 31/7/1957 (No. 613/57) is a forged document.

5. Whether the first defendants conveyed the said properties to the other defendants as alleged in the statement of claim.

6. Whether the said Syed Abdulrahman was guilty of forgery or using as genuine a forged power of attorney and convicted of such offences under sections 471 and 467 of the Penal Code at the Assizes held at Singapore on 20/3/1962.

7. Whether Syed Abdulrahman when he executed the mortgage in favour of the first defendants was in the execution of the mortgage acting within the scope of his authority real or apparent as the agent of Syed Eidrus and the mortgage was therefore valid and effective.

8. Whether there was delay in disclosing the forgery of the power of attorney to the first defendants, defendants 2(b) and 12(a) as a result of which their position has been materially prejudiced in that by reason thereof they have been unable to obtain restitution from the said Syed Abdulrahman and the plaintiff is therefore estopped from alleging that the indenture of mortgage is invalid and ineffective.

9. Whether the said Syed Eidrus was negligent in entrusting his title deeds to or leaving his title deeds with agents in such circumstances that the said agents would thereby be enabled to carry out the forgery and such negligence has materially prejudiced the first defendants, defendant 2(b) and defendant 12(a).

Before embarking on a statement of my positive findings on the above issues apart from issues Nos. 1, 2, 3 and 5 which I find clearly proved, it will, I think, be useful for me to analyse the evidence relating to the circumstances leading to the execution of the power and the subsequent mortgage of the properties of Syed Eidrus and to indicate my findings of fact thereon as follows:—

(a) The *dramatis personae* in this true-life melodrama of alleged fraud and forgery which has resulted in the present proceedings against the defendants, who are admittedly *bona fide* purchasers or mortgagees for value of the properties, are —

(i) Syed Eidrus (owner of the properties).

(ii) Syed Abdulrahman bin Abdullah Alsagoff (P.W.6) who is alleged by the plaintiff to be the villain of the piece.

(iii) Syed Saleh bin Eidrus Alsagoff (P.W.7), who was a partner with P.W.6 in Abdullah Alsagoff & Co. (hereinafter referred to as "the firm"), a firm of rent collecting agents having its office at No. 15 Klang Road.

(iv) Frederick Bernard Oehlers (P.W.1), an advocate and solicitor in whose presence the power was executed.

(v) Veerapillai (P.W.2), peon to Mr. Oehlers at the time.

(vi) Sulong bin Ismail (P.W.4), a crier to a firm of auctioneers at Bonham Building where Mr. Oehlers had his office, and who was an identifying witness.

(vii) Shaikh Abdullah bin Salim Alkhatib (P.W.5) an Arab teacher of religion and of Arabic who claims to have been present in Mr. Oehlers' office at the relevant time.

(viii) Kiong Chai Woon (D.W.1), a valuer who valued the properties and claims to have been asked by P.W.6 to find a mortgagee, and

(ix) Poh Kim San (D.W.2), representing the first defendants who are all brothers and to whom the properties were mortgaged.

(b) The firm managed the properties and collected rents which, less deductions, were remitted by devious means to Syed Eidrus in Sourabaya. The title deeds of the properties were kept in a safe in the office of the firm. The keys thereto were kept exclusively by P.W.6. P.W.7 never had access to them at all because he merely performed the functions of a rent collector who handed the rents collected over to P.W.6 whilst the latter, who is his uncle, attended to all other aspects of the firm's business, including correspondence, accounts, banking, payment of rates and maintenance charges, remittances to owners, etc. In short, P.W.6 provided the brain whereas P.W.7 provided the brawn. Although P.W.7 considered that he was the more hardworking partner because of the physical exertion involved in travelling around Singapore to collect the said rents, it is quite clear that, for all practical purposes, P.W.6 was in complete charge of every aspect of the firm's affairs except rent collections.

(c) The firm managed not only the properties of Syed Eidrus but, altogether, some 300

to 400 properties belonging mostly to Arabs residing in Arabia or Indonesia. All these owners, who were non-English speaking, kept their deeds in the custody of the firm, as agents, "according to Arab practice and procedure" Except where specific authority was given by any particular owner, the duties performed by the firm were merely to collect rents, execute repairs to the properties and to remit moneys, less rates, commissions and incidental expenses, to the owners in Arabia or Indonesia.

(d) The properties had been managed by the father of P.W.6 from as far back as 1927 or even earlier, and on the death of the father in 1942, the remaining partners of the firm continued the management of the properties of Syed Eidrus. At the end of the Japanese occupation, the only partners who were alive were P.W.6 and P.W.7 who carried on as agents of Syed Eidrus until at least 1957 when the alleged forgery of the power is said to have taken place. It is, therefore, beyond dispute that for thirty years at least the firm had enjoyed, without a break, the complete confidence reposed in it by Syed Eidrus and, for that matter, all its other clients.

(e) Three days or so before the execution of the power, Mr. Oehlers had seen a couple of Malays sitting at the desk of his chief clerk, Lim Chew Kok, and came to know that they were there in connection with the execution of a power of attorney. On the morning of the date of execution, Mr. Oehlers told his chief clerk "to hurry up" as he wanted to leave the office. The donor came into his room and was identified to him as Syed Eidrus by both his chief clerk and P.W.4 Sulong bin Ismail.

(f) The gist of Mr. Oehlers' evidence on the question of the donor's identity is to the effect that he was a well-dressed Arab type gentleman who looked affluent, appeared to be 48/49 years of age and spoke Malay with an Indonesian accent. He said that the photograph of Syed Eidrus in his passport dated 9th February, 1927 (Exhibit D1) resembled the person who executed the power. He was definite that P.W.5 (Shaik Abdullah bin Salim Alkhatib) was not that person, as the latter was thinner and almost hollow-cheeked whereas the donor was bigger-built and younger. It must, however, be remembered that the present photograph was taken at least 30 years before the date on which Mr. Oehlers saw the donor. Syed Eidrus must, himself, have considerably aged by 1957 and could not have presented the young and cherubic appearance he had in 1927. Mr. Oehlers agreed that the other Malay whom he saw on two occasions with the donor was P.W.6 (Syed Abdulrahman bin Abdullah Alsagoff). He was, however, quite clear that P.W.6 was not the person who executed the power.

(g) Lim Chew Kok, Mr. Oehlers' chief clerk, could not be called to give any evidence with regard to the execution of the power because he died in December, 1959.

(h) Mr. Oehlers' peon, P.W.2 (Veerapillai), gave evidence to the effect that the two Arabs who were present in Mr. Oehlers' office at the time of the execution were P.W.6 and P.W.5. He did not recognise the passport photograph of Syed Eidrus although he admitted that he had told Mr. Oehlers that the man in the photograph could have been one of the two Arabs concerned. Syed Eidrus and P.W.6 are first cousins and according to P.W.6 they resembled each other. It is, therefore, not unlikely that P.W.2 was thinking of P.W.6's face when he was shown the passport photograph. Having clearly identified one of the Arabs as P.W.5, he described the second Arab as short and stout and dressed like an Arab gentleman. After seeing P.W.6 he identified the latter as the second Arab who had previously come to the same office in 1953 to see Mr. Oehlers' uncle. I am not, therefore, prepared to accept the submission that he ever made a satisfactory identification of the man in the passport photograph as one of the two Arabs concerned. As P.W.2 was not inside the room at the time of the execution he cannot, of course, say which one of the two Arabs executed the power.

(i) P.W.4, the crier, was an unsatisfactory and obviously unreliable witness who contradicted himself constantly. He was one of the identifying witnesses. At one stage he said that P.W.6 executed the power and at another he said that it was P.W.5. He said that he was asked by P.W.6 to be an identifying witness. I am thoroughly satisfied that this witness knew that the person who executed the power was definitely not Syed Eidrus. He made the illuminating observation that P.W.6 had told him that Syed Eidrus was dead and that P.W.5 would give him a power. I am somewhat surprised that Mr. Oehlers should have relied on him. I can only assume that he trusted the other identifying witness, his chief clerk, to such an extent that he did not give serious thought to the credentials for respectability which this witness had (or did not have). One would have thought that a man of proved repute and integrity, if not substance, could have easily been found to identify a wealthy landowner of the standing of Syed Eidrus in place of an auctioneer's crier.

(j) I now come to the evidence of P.W.5, an Arab teacher of religion and of Arabic. He was a close friend of P.W.6, whose children he had taught in the past. He now lives on public assistance. He says that he was taken by P.W.6 to Mr. Oehlers' office on the morning in question and that he was asked to write a name in Arabic on a power of attorney from Indonesia,

and that he was told, presumably, by P.W.6, that the lawyer wanted a religious teacher who could write Arabic. He was then asked to write a name in Arabic and he did so. The name he wrote out was, according to him, "Said Basbaer". He reproduced this name on Exhibit P19. On being shown the power, he denied that the signature of the donor was his. On being shown Exhibit P15 (a power actually executed in 1927 by Syed Eidrus) he agreed that the signature thereon was different from that on the power. He said that the signature on Exhibit P15 was in links and more scholarly. On being shown another example of the signature of Syed Eidrus (Exhibit P20), a letter dated 22nd May, 1961 which was later included in Exhibit P25, he was positive that this signature had no resemblance to the signature on the power. Towards the latter part of his evidence, in answer to a question by the court, he was definite that the signature on the power was his. This is another witness whom nobody can easily trust but it is part of the price we have to pay for democracy, I suppose, that the taxpayer, through the Public Assistance Department, has to contribute towards his maintenance.

(k) P.W.6 also gave evidence on the question of the identity of the donor of the power. He had forgotten who executed it although he admitted responsibility for its execution by someone who was not Syed Eidrus. He said that Syed Eidrus had last visited Singapore in 1928 and that he had never seen him since. He admitted that he instructed Mr. Oehlers' chief clerk to prepare the power and that he introduced someone whom he could not remember, to the chief clerk as Syed Eidrus. He was quite positive that the power was forged.

Although he was convicted and sentenced to six years' imprisonment in Assize Case No. 76 of 1961 (Exhibit ABC52 *et seq.*) for a number of offences involving forgeries of powers, the record does not show that any of the offences which he had asked to be taken into account in passing sentence related to the forgery of the power. He claimed that he had, in fact, given instructions to his solicitor or his solicitor's clerk, one S. J. Alfred, to include the offence of using the power as genuine when forged amongst the offences to be considered.

(l) Evidence was called to show that a search of the records of the Immigration Department for 1956/1957 contained no confirmation of the fact that Syed Eidrus had entered Singapore during those years, and also to show that the chances of his having come to Singapore in 1957 were otherwise remote.

(m) Purporting to act on the authority of of this power, P.W.6 proceeded to mortgage the properties of Syed Eidrus to the first defendants on 30th September, 1957 for a sum of $100,000 with interest thereon at the rate of $1.10 per $100 per month (Exhibit ABC1 *et seq.*). P.W.6 fell into arrears of interest and eventually the properties were sold by auction on 16th/17th August, 1960 to the other defendants in this suit.

(n) On 30th June, 1961 a receiving order was made against the firm (Abdullah Alsagoff & Co.). P.W.7 who had been a partner in this firm claimed to have retired from it and P.W.6 was adjudicated a bankrupt on 29th September, 1961 and he still remains an undischarged bankrupt who has not yet filed his statement of affairs.

(o) P.W.7 (Syed Saleh bin Eidrus Alsagoff) gave positive evidence to the effect that the signature of the donor on the power was definitely not that of Syed Eidrus and that it had no resemblance at all to the signature on Exhibit P15 which was a genuine power executed by Syed Eidrus.

(p) Before I complete my analysis of the evidence I think I should refer, in particular, to the circumstances in which P.W.7 came to discover that the properties of Syed Eidrus had been mortgaged. According to this witness he was told by P.W.6 to stop collecting rents on these properties in August or September, 1960, but he was not told that these properties had been mortgaged. He only discovered this in May, 1961.

(q) He was a bovine type of witness who trusted his uncle, P.W.6 implicitly and it never occurred to him to question him in any way about the conduct of the affairs of the partnership. He had no access to the title deeds, accounts, books or correspondence of the firm. As I have said earlier, he was pure brawn as against the brain of P.W.6, and it was only in May, 1961 that he came to discover that the properties of his own wife, Sheriffa Shaikhah, which were being managed by the firm, had been mortgaged by P.W.6, who purported to act under a power of attorney from the wife of P.W.7 which was, in fact, forged. As a consequence he consulted his solicitors, Messrs. Mallal & Namazie, who set the law in motion as a result of which P.W.6 was arrested, charged and subsequently convicted and sentenced in Assize Case No. 76 of 1961, *inter alia*, for that particular offence.

(r) This witness who claims to have retired from the partnership of the firm in May, 1961 gave evidence to the effect that soon afterwards he saw the plaintiff in these proceedings and told him about what had happened to his wife's properties. He also told the plaintiff, for the first time, that the properties of Syed Eidrus had been sold by P.W.6. The plaintiff became suspicious because Syed Eidrus was his brother. In addition to the properties of Syed Eidrus, properties

belonging to his mother, his wife and his elder brother were also being managed by the firm. It would appear from the evidence that the plaintiff went to Indonesia to consult Syed Eidrus and that it was after this that the plaintiff and the witness decided to take action against P.W.6. It is not very clear whether this witness consulted Messrs. Mallal & Namazie immediately after he discovered evidence of a suspected fraud on his wife or whether it was after he had consulted the plaintiff and after the plaintiff had consulted Syed Eidrus in Indonesia that they proceeded to instruct their solicitors to take action. However, it is sufficiently clear that all these events did take place during the month of May, 1961. It is also clear that the suspicions of the plaintiff and P.W.7 were confirmed only after they saw their solicitors and it was only then that the fraud committed by P.W.6 came to light.

(s) As I have said earlier, this witness was not particularly intelligent but I have no reason to doubt the veracity of his evidence. I, therefore, reject the contention of defence counsel that he was privy to the fraud committed by P.W.6 and that the latter had asked him to keep quiet about it. He may be bovine but he is not completely asinine.

(t) Not long afterwards, on 16th July, 1961 P.W.7 received a cable (Exhibit P23) from Indonesia, informing him that Syed Eidrus had died the previous day. This unfortunte occurrence no doubt played some part in the delay which subsequently occurred in bringing the true facts to the notice of the first defendants. It should, however, be borne in mind that investigations by the police had not yet been completed. It was, therefore, only in March, 1962, at or about the time of the conviction of P.W.6, that the first defendants were first notified.

I now turn to my findings on issues Nos. 4, 6, 7, 8 and 9 above.

With regard to issue No. 4, i.e., whether the power is a forged document, my finding is in the affirmative. In my opinion the evidence clearly reveals P.W.6 to be a villain of the deepest dye. It is true that he has purged his other offences by serving a sentence of six years' imprisonment less obvious remissions for ill-health but the offence relating to this power was never directly drawn to the attention of the sentencing judge although he did admit using four other forged powers (not included in the indictment) about which no particulars were, however, disclosed, and about which the Public Prosecutor was ignorant. Notwithstanding the doubt as to whether this offence had been clearly revealed to the learned judge he was prepared to admit it to me. He is bed-ridden and has little to gain by lying on this point and I accept his evidence on this, though he says that he has forgotten whom he introduced to Mr. Oehlers in place of Syed Eidrus.

Despite the evidence of Mr. Oehlers, who was obviously in a hurry on the morning in question and cannot now be expected to remember all the details, the evidence does point towards P.W.5 as the impersonator though not with that high degree of probability required to prove criminality on his part. The police, who investigated the matter after the conviction of P.W.6, did not consider that a prosecution would be justified and have taken no further action against him. This disposes of issue No. 6 as well. I find that particulars of the use of the power in the present case were not disclosed to the learned judge in the Assize case heard on 20th March, 1962 and that P.W.6 was not found guilty of using it although the use of four forged powers (of which this may have been one) was, no doubt, taken into consideration in the assessment of sentence. The fact remains, however, that, on the present evidence, he did use the forged power as genuine because, no matter who signed it as donor, I am quite satisfied that Syed Eidrus himself was not in Singapore then or at all after 1927 and did not execute it. The evidence from the Immigration Department, the evidence of and relating to the handwriting and indeed the totality of the rest of the evidence clearly shows that, if it was not P.W.5 who executed the power, it was someone other than Syed Eidrus — perhaps some other Arab gentleman resembling him to a certain extent who spoke with an Indonesian accent.

Which brings me to issues Nos. 7 to 9, the onus of proving which lies on the defence.

Mr. O'Connor for the defence contended that acceptance of P.W.6's evidence on one issue would necessarily require my accepting the rest of his evidence and, in particular, that he had disclosed to Syed Eidrus his wrongdoing in mortgaging the properties two months after the mortgage and that Syed Eidrus asked him to "pay the money quickly", and "be careful, don't let my houses be sold". I do not think I am bound to accept every part of the evidence of P.W.6. Indeed it would be unsafe in my opinion to accept any part of the evidence given by him except in so far as it finds support in other acceptable evidence or is evidence of such a kind that from its very nature it cannot be disputed. I, therefore, find that P.W.6's evidence of his confessing his wrongdoing to Syed Eidrus two months after the mortgage is unacceptable as it is completely contradicted by letters from Syed Eidrus to P.W.7 (Exhibit P25) which I admitted as evidence of conduct on the part of Syed Eidrus and not as to the truth of their contents.

From these letters it is clear that Syed Eidrus was reasonably well disposed towards P.W.6 prior to May, 1961 and that in all the

earlier letters he has been at pains to send his regards to P.W.6 through P.W.7, whereas in a letter dated 22nd May, 1961 and thereafter, he completely changed his tune and was crying out loud for vengeance — ". . . Prosecute him. . . . Don't make any further delay. What he has done it was beyond limit. No one has done like him before. He is not afraid of God nor the people around him. . . .".

These letters certainly go towards showing that Syed Eidrus did not know that his properties had been mortgaged until May, 1961. If he had, it is extremely doubtful whether he would have asked P.W.7 to convey his regards to P.W.6.

From May, 1961 until his death on 15th July, 1961, Syed Eidrus wrote a series of letters in which his main concern was to ensure that the wrong that had been done to him was righted. I have little doubt that the state of shock induced by these revelations to the sickly man that he was in May, 1961, accelerated his death which followed.

It is no doubt true that, as Mr. O'Connor contended, there is a gap of about eight months between the last letter dated 23rd September, 1960 from Syed Eidrus (Exhibit P28 page 62) and his next letter dated 22nd May, 1961 (Exhibit P28 page 65) apart from receipts for certain prescriptions dated 7th November, 1960 which are unexplained.

In view of the opinion I have formed of P.W.7's veracity, despite the low calibre of his intelligence, and also partly because of the latter quality, I see no reason why I should conclude either that letters between these two dates have been suppressd by P.W.7 so as to hide the truth or that Syed Eidrus knew from P.W.6 or otherwise before 22nd May, 1961 that his properties had been mortgaged. P.W.7 said that, although he had been told by P.W.6 to stop collecting rents on these properties in August or September, 1960, because the properties had been sold on the instructions of Syed Eidrus, he did not know, at that time, that the properties had previously been mortgaged. He admitted being afraid of asking P.W.6 why various properties were being sold as P.W.6 was his uncle and an older man in whom he had complete faith and of whom he stood in awe.

I, therefore, accept his evidence that he did not inform Syed Eidrus about the sale of these properties because he considered it to be none of his business. For one thing he trusted P.W.6 and secondly, he knew that Syed Eidrus also trusted P.W.6 implicitly. In fact he had done so for several decades.

Indeed, the fact that it took P.W.7 some considerable time to discover that his own wife's properties had been mortgaged strongly supports the view that he did not discover the true facts relating to the properties of Syed Eidrus until after he had discovered the fraud on his wife and because of it. If it had not been for this discovery he may well have continued to remain sublimely ignorant of any of the frauds committed by P.W.6. Indeed, if it had not been for this fortuitous miscalculation of the odds of discovery (which criminals fortunately evince in their foolhardy haste to advance their nefarious interests) P.W.6 may well have deluded owners of properties managed by his firm for many more years. It was the fraud perpetrated on his partner's wife which hastened the discovery of all his other frauds. To this limited extent, therefore, owners of properties managed by the firm may owe a debt of gratitude to P.W.7, however slow and unsuspecting he may have earlier been and, I suppose, one must be thankful that he did not continue to remain, like Rip van Winkle, in a deep stupor for a hundred years.

The next issue to be determined is issue No. 7. Was P.W.6 acting within the scope of his authority, real or apparent, as the agent of Syed Eidrus when he executed the mortgage in favour of the first defendants and, if so, was the mortgage, therefore, valid and effective?

On this issue I am in entire concurrence with the views expressed by Ambrose J. in *Sheriffa Shaikhah* v. *Ban Hoe Seng & Co. Ltd.*[1] where the defendant in that case raised the same question. The plaintiff was P.W.7's wife to whom I have already referred. Her title deeds were in the possession of P.W.6 who mortgaged the properties concerned with the aid of a forged power. In his judgment Ambrose J. said —

> "I had to consider whether Syed Abdulrahman had actual or ostensible authority to mortgage the plaintiff's properties. It was clear that he had no actual authority to do so. His actual authority was limited to collecting rents, paying rates and assessments and attending to repairs. The next point I had to consider was this: did he have any ostensible authority to mortgage the plaintiff's properties? He was an estate agent and he had possession of the title deeds. I rejected the suggestion in the defendant's pleading that these two facts amounted to a representation that Syed Abdulrahman had authority to deal with the plaintiff's properties, and that they gave rise to such a presumption; for possession of title deeds might imply nothing more than a keeping for safe custody. I took the view that the authority given to estate agents by their principals varies. It seemed to me, therefore, that Syed Abdulrahman had no ostensible authority to mortgage the plaintiff's properties. In my judgment, anyone whom he approached for a loan on the security of a mortgage of the plaintiff's properties would be put on inquiry to ascertain whether or not he had actual authority to mortgage the properties. To my mind it appeared that the defendant relied on the actual authority contained in the forged power of attorney and not on the alleged ostensible authority of an estate agent in possession of title deeds".

The answer to the question raised in issue No. 7 is, therefore, in the negative. As their Lordships in the Privy Council case of the

Attorney-General for Ceylon v. *A. D. Silva* [2] said —

"All 'ostensible' authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a 'holding out' by the principal".

I now turn to a consideration of issues Nos. 8 and 9 relating to the delay in *disclosing the forgery* to the first defendants and negligence on the part of Syed Eidrus in entrusting his title deeds to the firm.

It may be convenient to take issue No. 9 first on the *question of negligence.* The following cases in chronological order set out the principles to be applied in determining whether negligence will defeat a claim for avoidance of forged transfers.

In *Bank of Ireland* v. *Evan's Trustees* [3] (I now quote from the headnote),

"Trustees of a charity in Dublin incorporated by Act of Parliament, and having a common seal, possessed stock in the public funds, which stock was in Ireland registered in the Bank of Ireland. *G.*, the secretary of the incorporated trustees, was allowed to have the seal in his possession. Five several powers of attorney prepared in different years, sealed with the seal of the incorporated trustees the due affixing of which seal was attested by witnesses, who (though without any fraudulent intention) attested what was not true, since the seal was affixed by the unauthorised act of the secretary alone, were presented to the bank, and the stock was transferred. The facts were afterwards discovered, and *G.*, the secretary, was indicted and convicted. By a power of attorney duly executed, the trustees then authorised *C.* to transfer the stock, but the bank refused to make the transfer. An action was brought by the trustees on this refusal; the judge who tried the cause, told the jury that if under these circumstances the trustees had so negligently conducted themselves, as to contribute to the loss, the verdict must be given for the bank. On exceptions for this direction: Held, that it was wrong".

The Lord Chancellor held, at page 960, that the trial judge was wrong because

"The direction of the very learned judge who tried the case was clearly not warranted by law. The direction was that if the transfer was caused by such negligence on the part of the trustees as that of which evidence has been given, then that the bank was absolved.

I apprehend that there is no such principle of law. I think it has been fairly put, that there must be either something that amounts to an estoppel, or something that amounts to a ratification in order to make the negligence a good answer".

In *re Cooper,* [4] it was held that a son who executed mortgaged deeds by personating his father had committed forgery thereof and that nothing passed to the mortgagees. As Lindley L.J. said at page 634 —

"There is only one other point to which I will allude, and it is this. It is said, and with some truth, that the plaintiffs were guilty of negligence in not registering the will, and no doubt in one sense it is the non-registration of the will which has led to this unfortunate fraud. But are they in point of law responsible for that? It appears to me that they are not, and this conclusion is amply covered by authority. The fraud and the loss to the mortgagees is not sufficiently the proximate result of the plaintiffs' negligence to make them in law responsible for it. A crime intervened — the forgery; and, although they were negligent in not registering the will, that negligence was not the proximate cause of the forgery and still less the proximate cause of the fraud which was the result of the forgery. This point has been discussed more than once, and without referring at length to the authorities which dispose of it, I will mention the names of some of them to show that I am not speaking without consideration. The matter was much considered in the case of *Bank of Ireland* v. *Trustees of Evans' Charities,* and also in *Baxendale* v. *Bennett,* and in *Johnston's Claim.* In all those cases and I believe there are others), there had been negligence. That negligence had been followed by a crime — forgery or theft, or something of the kind — which had resulted in loss; and yet it was held that the fraud and the consequent loss were not sufficiently the proximate result of the negligence to make the negligent persons responsible for it".

In *The Mayor, Constables, and Company of Merchants of the Staple of England* v. *The Governor and Company of the Bank of England,* [5] the headnote reads as follows:—

"The plaintiffs, a corporated body, left their seal in the custody of their clerk, who, without authority, affixed it to powers of attorney, under which certain stock in the public funds, the property of the plaintiffs, was sold. The clerk appropriated the proceeds. In an action in which the plaintiffs claimed that they were entitled to the stock on the ground that it had been transferred without their authority by the defendants:—

Held, on the authority of *The Bank of Ireland* v. *Trustees of Evans' Charities,* that assuming the plaintiffs had been negligent their negligence was not the proximate cause of the loss, and did not disentitle them from recovering in the action".

As Bowen L.J. said at page 176 —

"Now here can it be said that the negligence, if it was negligence, of the plaintiff company was the proximate cause of the transfer? It seems to me that we must answer that there were no grounds upon which the jury could think that it directly led to the transfer. Mr. Drew was a person of position and of reputation; he was a man who might be trusted, to outward appearances, as much as any man in the country, and even if it was careless for the corporation to leave their seal with him, was it a direct and immediate consequence of that carelessness that he would commit the forgery he committed in the power of attorney, and that the bank would be induced by that to transfer the stock? It seems to me here that the proximate cause was the felony and crime of Drew, and that it cannot be said that the felony was itself either the natural or likely or necessary or direct consequence of the carelessness of the plaintiffs".

Finally on the issue of negligence I would refer to the Malayan case of *Choo Loong* v. *Lip Kwai Kow,* [6] where the headnote reads —

"The plaintiff, a woman unable to read or write English, became the registered proprietor of the premises known as No. 5, Main Street, Klang, by purchasing them from *L* on the 2nd March, 1929. On the 1st December, 1929, *L*, by a trick, obtained the plaintiff's grant and charged the premises to the defendant two days later.

Early in August, 1930, *L*, who, up to this time was a person of good repute, absconded, and the plaintiff then became aware of the charge. Between December,

1929, and August, 1930, plaintiff met *L* six times on three of which she reminded him about her grant.

After *L* had absconded, the plaintiff brought this action for a declaration that the charge in favour of the defendant was a forgery and for an order that the registering authority should cancel the registration of the charge.

The defendant argued that the plaintiff was estopped from denying her execution of the charge on the following grounds:

(1) Plaintiff had been negligent in giving her grant to *L* whereby *L* was enabled to carry out the fraud.

(2) Plaintiff had been negligent in not inquiring earlier and more persistently for the return of her grant.

Held, that the conduct of the plaintiff in handing over her grant to *L* did not amount to negligence, and even if it did, it was not the proximate or real cause of the defendant's loss.

Held further, that the conduct of the plaintiff between December, 1929, and August, 1930, was not negligent, and since nothing had happened which imposed on the plaintiff any duty towards the defendant to inquire for the grant the plea of estoppel for that period failed".

It is clear from these cases that mere negligence will not suffice to defeat the plaintiff's claim but that the defendants must prove that that negligence was the proximate or real cause of the fraudulent transfer.

As Lord Herschell L.C. said in *Brocklesby* v. *Temperance Building Society* — [7]

"There can be no doubt that the mere possession of deeds of title, although that possession has been lawfully acquired from the real owner of them, will not of itself validate a security given by the person to whom the possession of the deeds has been committed where there was no authority given to him to use the deeds as security. That is old law, and was distinctly laid down in the case of *Martinez* v. *Cooper*. It is only if there has been on the part of the person who trusts the other with the deeds either fraud, or, as it has been sometimes said, such negligence as to be evidence of fraud, that the permitted possession of the deeds of another will validate a security given without the authority of the owner of the deeds".

I now turn to the facts of the present case. Applying the principles which emerge from the cases I have cited, I find that the conduct of Syed Eidrus in entrusting his title deeds to the firm was neither fraudulent nor such negligent conduct as to be evidence of fraud. He had entrusted his title deeds to the firm for a period of more than thirty years during which period he had had no cause for concern over their safety or that they would be likely to be put to any improper use. I, therefore, find that he was not negligent at all. Even if he was (which, of course, I do not find) such negligence was not the proximate or real cause of the fraud. The answer to issue No. 9 is, therefore, also in the negative.

Last of all, I turn to issue No. 8. It seems to me that the answer to this issue must also be in the negative. Undoubtedly there was some delay in disclosing the forgery of the power to the first defendants, namely, between May, 1961 and March, 1962 but I do not think that this delay has materially prejudiced the first defendants or otherwise conduced towards their suffering such detriment in obtaining restitution from P.W.6 as would give rise to estoppel. The plaintiff is, therefore, not estopped from alleging that the forgeries are nullities.

In *Fung Kai Sun* v. *Chan Fui Hing*,[8] the facts and decision appear in the headnote as follows:—

"The manager of certain real property belonging to the respondents fraudulently mortgaged it by means of forged mortgages to the appellant, whose first intimation that the mortgages were alleged to be forged was the service of the writ by the respondents in their action against him for a declaration that the mortgages were null and void and should be set aside. There had been no contractual or other relationship between the respondents and the appellant and the former, after they became aware of the forgery, had, for their own purposes, delayed for about three weeks — until the issue of the writ — before informing the appellant of the forgery. By his defence the appellant alleged, *inter alia*, that the respondents' silence had deprived him of any opportunity of obtaining restitution from the forger, and he claimed that they were therefore estopped from saying that the deeds were not executed by them.

Held, that the respondents were not entitled to withhold from the appellant information that his mortgages were forgeries, and that when they chose to do so they took the risk that they would later be estopped from asserting that the deeds were forged if by reason of their keeping silent the appellant had suffered detriment. The true test was whether the appellant's chance of recovering from the forger had been materially prejudiced by the delay. In the circumstances of the present case, however, the appellant had failed to establish that he had suffered such detriment by reason of the delay as would give rise to estoppel".

Lord Reid, in delivering the judgment of the Privy Council, said at page 500 *et seq.* —

". . . it was argued for the appellant that the respondents had a duty to inform the appellant immediately they discovered the forgery, that if the appellant had been told in time he might have taken some action against the forger while he could still be found in Hong Kong, and that the respondents' delay in fulfilling their duty, having deprived the appellant of an opportunity to take action against the forger while he could still be found, must result in the respondents being now estopped from pleading the forgery against the appellant. This argument raises two questions; first, whether the respondents had any duty to inform the appellant of the forgery, and, secondly, if they had such a duty, whether their delay in informing him caused detriment to him so that they are now estopped from asserting against him that the deeds are forged. . . .

It was argued for the respondents that they were under no duty to volunteer information to the appellant, and that, as they never said or did anything which misled the appellant, they cannot now be prevented by mere delay from asserting the truth about the deeds. It was said that as there was no contractual or other relationship between the respondents and the appellant there could be no duty to volunteer information. It is quite true that there was no duty in the sense that failure to perform it would be a tort or a ground for an action of damages. But it is well established that silence can in some cases give rise to estoppel without there

having been a duty in that sense: one example is given by Lord Cranworth L.C. in *Ramsden* v. *Dyson*: 'If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented.

The question in this case is whether any duty of that kind arises when a person learns that another person is holding and relying on a forged deed which bears to be signed by him. It is unnecessary to enter on any general consideration of the basis of this kind of duty because there is cogent authority in favour of there being a duty of this kind on a person who becomes aware that another person holds a forged deed which purports to be signed by him, and there does not appear to be any direct authority to the contrary effect. . . .

In their Lordships' judgment it must be held that the respondents were not entitled to withhold from the appellant information that the appellant's mortgages were forgeries, and that when they chose to do so they took the risk that they would later be estopped from asserting that these deeds were forged if by reason of their keeping silent the appellant suffered detriment. . . .

In their Lordships' judgment this is the true test: the chance of recovering must have been materially prejudiced by the delay. In the present case their Lordships are of opinion that the appellant has not shown that he was materially prejudiced by the delay. The appellant took no action when he was told of the forgery, and he did not give evidence in this case. In the absence of any explanation from him, and the whole trend of the evidence being to show that he would not have taken any action even if he had been told of the forgery earlier, their Lordships are not prepared to assume that he might have done so, and it is only on that assumption that he can have suffered any possible prejudice by the delay. Their Lordships therefore hold that no estoppel arises from the respondents having delayed to inform the appellant that his mortgages were forged".

Although P.W.6 (Syed Abdulrahman bin Abdullah Alsagoff) was not adjudicated a bankrupt until 29th September, 1961, his act of bankruptcy was committed on 17th May, 1961. By virtue of section 46 of the Bankruptcy Ordinance (Cap. 11) his bankruptcy is deemed to relate back to and commence at the time of the act of bankruptcy. Since the fraud was not discovered till May, 1961 when the act of bankruptcy occurred, even if the defendants had been notified of the alleged forgery in May, 1961, they could never have successfully pursued their remedies against the bankrupt then. It should also be noted that section 51 of the Bankruptcy Ordinance avoids certain voluntary settlements made by the bankrupt prior to his bankruptcy. As Mr. Mallal put it, if anything had been recovered it would have had to be returned.

It should also be remembered that police investigations, which had commenced in May, 1961, were not completed until after some time and that the bankrupt was only finally convicted in March, 1962. It should also be borne in mind that civil proceedings would ordinarily await the conclusion of criminal proceedings founded on the same facts.

It is always a difficult task to decide which one of two innocent parties should suffer, but I have no choice, having regard to the state of the law as it stands and having regard to the facts of the particular case as found by me.

I have, therefore, no alternative but to deliver judgment in favour of the plaintiff as claimed with costs and to extend my sympathies to the defendants for the unhappy position in which they now find themselves.

Judgment for the plaintiff.

Solicitors: *Mallal & Namazie; Rodyk & Davidson.*

VAEYAPURI v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Pike C.J. (Borneo) and Gill J.), October 19, 1965]

[K.L. — Federal Court Criminal Appeal No. 7 of 1965]

Penal Code, s. 302 — Murder — Summing-up — Failure to direct jury of the possibility of lesser verdict of culpable homicide not amounting to murder.

The appellant was convicted of murder. According to the prosecution story the appellant being to some extent under the influence of liquor went to the house of his wife from whom he was separated, made an attack on members of her family and subsequently struck a violent blow with a heavy parang on the deceased woman. The appellant's story was that he went to the house peacefully although he had a parang with which he used to cut firewood; that he was attacked and that he really did not know how the dead woman came by her injury. The learned trial judge put the case to the jury as a clear cut choice between murder and no offence If, he said, the prosecution evidence was believed it was a case of murder; if the appellant's defence was accepted it was a case of no offence. The appellant was found guilty. On appeal,

Held: there was as a possibility that if it had been left to them, the jury might have been prepared to take the view that the killing of the deceased woman happened while the appellant was disengaging himself from some sort of combat initiated by him and in that event it would have been open to them to find the appellant guilty of something less than murder, that is culpable homicide not amounting to murder;

(2) in the circumstances of the case, the Federal Court would substitute a conviction for culpable homicide not amounting to murder.

Cases referred to:—

(1) *R.* v. *Carr-Briant* [1943] K.B. 607.

(2) *Kwaku Mensah* v. *King* [1946] A.C. 83, 92.

FEDERAL COURT.

K. Rajanayagam for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Thomson L.P. (delivering oral judgment): This appellant was convicted for murder in contravention of section 302 of the Penal Code.